No. 8880

United States Circuit Court of Appeals

For the Ninth Circuit

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD, *Appellants*,

vs.

REPUBLIC GEAR COMPANY, a corporation, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

PRELIMINARY STATEMENT

The original complaint (R. 1) in the instant case was filed in the Superior Court of the State of Washington and alleged that the joint negligence of the defendant Morrison Mill Company (owner of a truck) and the defendant Frank Day (truck driver) combined with the negligence of the defendant Republic Gear Company (manufacturer and appellee) to cause the accident in question. Among other things it was alleged (R. 10):

> "That said truck was parked without a tail light or any lights in the rear whatsoever. That said truck could have been coasted off the paved portion

> of said highway before it came to a stop and after said axle broke. That said truck was left without any light, guard, signal or watchman by the driver, an employee of the Morrison Mill Company, and during his absence and while said truck was so standing in its disabled condition * * * "

the instant collision occurred. The plaintiffs subsequently filed an amended complaint (R. 29) in which the only material change was the omission of all specific allegations of negligence on the part of the defendants Morrison Mill Company and Frank Day. At that stage of the proceedings, the defendant Republic Gear Company removed the cause to the U. S. District Court (R. 36) inasmuch as the only remaining controversy was one between the plaintiffs and the defendant Republic Gear Company. Republic Gear Company then filed a demurrer (R. 50) to the amended complaint in the District Court, and after briefs were filed and oral arguments heard by the court, said demurrer was sustained. Plaintiff thereupon filed a second amended complaint (R. 42) which in no material respects altered the allegations purporting to state a cause of action against the Republic Gear Company. Such slight changes as were made were (1) the omission of certain general allegations of negligence on the part of the Morrison Mill Company, and (2) the insertion of an allegation to the effect that the collision occurred "before it (the truck) could be removed from said highway." Incidentally, the original complaint had included an allegation to the effect that the driver *could* have driven onto the shoulder of the road, had he so desired.

The material allegations of appellant's second amended complaint will be summarized in the statement of facts (page 4, this brief).

QUESTION INVOLVED

Appellants' statement of the question involved (page 6 of appellants' opening brief) is erroneous and misleading for it assumes the answer to the real questions raised in the lower court by the appellee's demurrer, which same questions are now before this court for review. Appellants stated the question as follows:

> "Is a manufacturer who negligently manufactures a defective automobile part, knowing that such a defect would constitute a hidden menace to the public when such defective part is used, liable to one who is injured as a proximate result of such use?"

Such question assumes that in fact a hidden menace to the public is shown from the allegations in the complaint, and furthermore, that the defect alleged was the proximate cause of the plaintiff's injuries. The real question which this court must determine is: *whether or not the negligent act of a manufacturer in producing a defective automobile axle which may break while the automobile is being used, causing the vehicle to lose its power of forward propulsion, will create a liability on the part of the manufacturer to third persons (that is, persons having no contractual privity) who are injured when after the first vehicle containing the defective axle has come to rest in a normal and lawful manner, another vehicle containing such third persons as passengers, without any mitigating circumstances being*

alleged, comes into collision with the rear of the lawfully stopped vehicle.

STATEMENT OF FACTS

Appellants in their opening brief have stated the facts by quoting at length the material portions of the second amended complaint. For the assistance of the court those facts may be summarized as follows:

The appellee is alleged to have negligently manufactured and inspected a certain automobile axle, thus leaving it in a defective condition. Furthermore, appellee is alleged to have represented to the public that the axle was safe and fit for installation in trucks such as the one belonging to the Morrison Mill Company. The axle was then sold to a Washington distributor who resold the same to the Morrison Mill Company. The latter company installed the axle in one of its trucks and after continuous use therein for approximately two and a half months and while said truck was proceeding along the highway, the axle broke and the truck became disabled to the extent of being unable to move under its own power, causing the truck to come to rest on the highway. While the truck was stopped, a car in which appellants were passengers came into "violent collision" with said truck, causing the damages which appellants allege. It should be added that the amended complaint contains no allegations whatsoever of any negligent or unlawful acts upon the part of the truck driver; in fact, it is affirmatively alleged that appellants' car crashed into the truck before the driver could have removed

the truck from the place where it had come to rest on the highway. No facts are alleged which explain how the appellants' automobile happened to collide with the truck.

ARGUMENT ON ASSIGNMENT OF ERROR 1

Appellee contends that the court properly sustained the demurrer to the second amended complaint. The argument on this point will be subdivided as follows:

A. Appellee owes no legal duty to the appellants.

B. Appellants are guilty of contributory negligence as a matter of law.

C. Appellee's acts were not the legal or proximate cause of appellants' injuries.

A. APPELLEE OWES NO LEGAL DUTY TO THE APPELLANTS

The liability in tort of a manufacturer to a party who bears no contractual relationship to him has always been strictly limited. In fact, the general rule is that no such liability exists. *Winterbottom v. Wright*, 10 M. & W. 109 (England, 1842). Both the general rule and the exceptions thereto have been exhaustively annotated in 17 A. L. R. 672; 39 A. L. R. 992; 63 A. L. R. 340; 88 A. L. R. 527; 105 A. L. R. 1502; 111 A. L. R. 1239. In the last of the aforementioned annotations the writer concludes as follows (p. 1240):

> "As stated in the earlier annotations, it is a general rule that a manufacturer of a defective article is not liable for injuries to the person or

> property of an ultimate consumer who has purchased from a middle man, unless the article was inherently dangerous to life or property, the theory being that, in the absence of contractual relations between the parties, no liability can be predicated upon the manufacturer's negligence, * * *.
>
> " * * *
>
> " * * * to the general rule of nonliability an exception exists in cases where the article or substance manufactured or packed is inherently or essentially dangerous in its nature, or where an ultimate consumer is likely to be injured because of known improper construction, * * * or because of the use to which it is to be put by whoever may use the same, for the purpose for which it was intended; * * *."

The exception to the general rule upon which the appellants herein are presumably relying was carefully analyzed and set forth with appropriate limitations by the late Judge Cardozo, then of the New York Court of Appeals, in the leading case of *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696. That case held that despite all absence of contractual privity between the purchaser and the defendant, where the defendant's negligence had permitted a car to be equipped with a defective wheel, the purchaser of such car could recover from the negligent parties for injuries sustained when the wheel collapsed causing the plaintiff-purchaser to be thrown out of the car and severely injured. This decision has been recognized as a landmark in the law of torts, because it far surpassed and extended the limits of tortious liability theretofore recognized. However, since that case, while many juris-

dictions have recognized the salutary results of the holding, countless other decisions have been called forth in order to limit and define the true scope of the new doctrine. It was to be expected that many of the countless thousands of persons injured in automobile collisions would attempt to hold the generally more solvent manufacturers liable if only the *MacPherson* case principle could be *stretched* to cover their situations.

Judge Cardozo himself recognized that the doctrine must be limited and stated that its limits must be ascertained as the cases arose. We quote hereinafter the guiding principles which he announced as a touchstone for determining when a manufacturer would thus become liable in tort, plainly indicating that the new doctrine was to be applied with reason and proper caution as guides. *McPherson v. Buick, supra,* 111 N. E. 1050, at 1053):

> "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be *knowledge of a danger, not merely possible, but probable.* It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing

> is dangerous may be sometimes a question for the Court, sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow." (Italics ours).

Judge Cardozo thus plainly announced that the duty of a manufacturer does not extend to *unforeseeable or remote possibilities* of injury, and that liability would ensue only where *the thing defectively manufactured was "such that it is reasonably certain to place life and limb in peril when negligently made.*" In applying such principles to the facts in the *MacPherson* case, Judge Cardozo said (at p. 1053):

> "This automobile was designed to go fifty miles an hour. *Unless its wheels were sound and strong, injury was almost certain.*" (Italics ours).

An examination of the cases which have applied the doctrine of a manufacturer's liability to third persons makes it eminently manifest that liability has always been predicated upon the presence of a defect which not only was attributable to the manufacturer's negligence, but also created a situation which exposed the plaintiff to an unreasonably and unusually dangerous situation. In words more commonly used by the courts, the negli-

gence must have created a "*hidden menace*" or "*imminent peril.*"

Thus, in *Johnson v. Cadillac Motor Co.*, 261 Fed. 878 (p. 12, appellants' brief), the manufacturer was held liable where the wheel on an automobile was so defective that it collapsed while the car was proceeding along the highway, causing the driver to lose control and the car to turn completely over and upon the plaintiff. Virtually the same facts existed in *Martin v. Studebaker*, 102 N. J. L. 612, 133 Atl. 384 (p. 15, appellants' brief). *Quackenbush v. Ford Motor Co.*, 153 N. Y. S. 131 (p. 15, appellant's brief), involved a defective brake which, on its failure to properly operate, caused the car to swerve violently, and run over an embankment, injuring the passengers.

In *Olds Motor Works v. Schaeffer*, 145 Ky. 616, 140 S. W. 1047 (p. 11, appellants' brief), the alleged defect again caused the driver to lose complete control of his car, violently injuring a passenger.

In *Goullon v. Ford Motor Co.*, 44 Fed. (2d) 310 (p. 13, appellants' brief), a defective steering wheel on a tractor broke, causing the driver to fall from his seat to the ground. In the decision in that case the court said:

> "We think it clear from the evidence in this case, and from common knowledge, that such a fall is the reasonably probable result of such a break. The driver occupies a seat which has no side support, and is surrounded by no cab or other protection. In the ordinary operation of the machine, he could not safely keep his seat, excepting as he

> supports himself by the steering wheel. * * * if the wheel gives way there is substantial probability that he will lose his balance and fall."

In *Hudson v. Moonier*, 94 Fed. (2d) 132 (p. 13, appellants' brief), the plaintiff, who was on foot, was run down by a truck where the driver of the truck could not stop because of defective brakes and could not warn the plaintiff because there was no horn on the car.

In *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (p. 14, appellants' brief), the plaintiff was injured at the time of a collision by flying glass from the windows of his automobile, although the manufacturer had represented the same to be shatter-proof.

In *Heckel v. Ford Motor Co.*, 101 N. J. L. 385, 128 Atl. 242 (p. 15, appellants' brief), a tractor exploded, some of the flying machinery striking the plaintiff-owner.

In *Rotche v. Buick*, 358 Ill. 507, 193 N. E. 529 (p. 15, appellants' brief), a defective brake caused a moving automobile to swerve into a ditch, injuring a passenger. Thus, in each case where the manufacturer of a defective part was found liable, the defective part either caused a moving vehicle to become wholly out of the driver's control, or the defective part itself directly injured some person. Furthermore, in every instance, to use the words of the late Justice Cardozo, when the part was defective in the manner stated, "injury was almost certain."

On the other hand, in the recent case of *Amason v. Ford Motor Co.*, 80 Fed. (2d) 265, the Circuit Court

of Appeals for the Fifth Circuit, affirming the District Court's ruling which had sustained a demurrer to the complaint, found that no cause of action had been stated against the manufacturer. The complaint had alleged that the door on an automobile was of defective design inasmuch as it was hinged from the rear rather than the front of the car, and as a consequence of such design the plaintiff was injured when he attempted to secure the door more firmly while the car was moving along the highway. The court in its opinion said that the car was *safe*, if properly operated. Furthermore (p. 266):

> "The manufacturer could have had no reason to contemplate the probabillty of such an accident from the ordinary use of the car. If the door had been firmly closed before the car was started, or if the car had been slowed down or stopped to shut the door, the accident would not have occurred. The deceased had had the car in his possession and use for some months. If it was dangerous to open the door under conditions shown, he had ample opportunity to acquire that knowledge. It is clear that the sole proximate cause of the accident was the negligence of the deceased in attempting to open and close the door when the car was running at a rapid rate."

The Circuit Court thereupon affirmed the District Court ruling which had dismissed the action on a demurrer. It would seem equally true on our own facts that: "The manufacturer could have had no reason to contemplate the probability of such an accident from the ordinary use of the car." While it is true that in both the *Amason* case and our own, the alleged defect created

the occasion which made the specific injury possible, it is equally true that in both cases the party plaintiff was not injured by any reasonably foreseeable consequence of the respective defective parts. Instead, the injury was the direct result in both situations of conduct by the plaintiffs themselves which was both unreasonable and unforeseeable under the alleged facts.

The appellants in this case are in effect claiming that the manufacturer owes an insurer's duty to the general public to see that every part of an automobile is so perfectly manufactured and inspected that no part shall go into the car which might conceivably require that car to cease its motion upon the highway. If such a duty existed, then even a supplier of gasoline or fuel might find himself liable if in a situation similar to ours the car was required to stop on account of foreign matter being present in the gasoline so as to plug the fuel line. Or suppose a spark plug or head lamp wore out prematurely, or the hood leaked, permitting water to reach the ignition so that a car containing any one of such countless possible defects would lose its power of propulsion upon the highway—could it be cogently argued that a manufacturer of such defective part or equipment thereby rendered himself liable to parties in a position comparable to that of appellants. It must be kept in mind that under the theory of the *MacPherson* case, supra, Cardozo, in announcing the new doctrine, said:

> " * * * If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.

> Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. *There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective.* That is not enough to charge the manufacturer with a duty independent of his contract."

To apply the *MacPherson* case doctrine to facts such as suggested in the foregoing illustrations would amount to an absurdity on its face.

The gist of the distinction between the type of situation presented in the appellants' complaint and the type where manufacturers have been held liable becomes plainly manifest when one recognizes that automobiles every day are compelled to stop upon the highway because of disabilities arising from merely worn out parts, parts which are not defective in any manner but merely have come to the termination of their normal life. Certainly, every driver knows, and unquestionably this court would not be exceeding its lawful province in taking judicial knowledge of the fact, that cars are required to stop on the highway because of worn out parts, on many occasions. Such stops are deemed normal and necessary behavior for vehicles—for the day of mechanical perfection is not yet. Many courts have held that automobiles, despite the possibility of such inherent

mechanical disabilities, are not "inherently dangerous instrumentalities" per se. Thus in *Dillingham v. Chevrolet Motor Co.*, 17 F. Supp. 615, 617, the Federal Court quoted from the syllabus of the case of *Ford Motor Co. v. Livesay*, 61 Okla. 231, 160 P. 901, as follows:

> "An automobile is not an inherently dangerous machine and the rules of law applicable to dangerous instrumentalities do not apply."

Yet the truck in the instant case allegedly because of appellee's negligence merely was required to stop upon the highway until a mechanical failure could be located and repaired, or the truck hauled away, in exactly the same manner as would have been done had some part of the car merely worn out. An automobile, truck or otherwise, is not transformed into an inherently or imminently dangerous vehicle because it may merely roll to a stop because of some defective part instead of having been caused to stop by reason of an absolutely unpreventable worn out part.

By no means do we wish to imply that manufacturers should not be held responsible where they create *unusual* and *unreasonably* dangerous conditions. A car with a wheel which may collapse or come off, or brakes which may not work, or whose engine may explode is thereby made a dangerous instrumentality, but such situations are clearly not to be compared with mechanical defects which merely add one more to the countless conditions which may result in a car's being required to stop upon the highway.

As stated in *Blashfield's Cyclopedia of Automobile Law*, (Permanent Edition) at §4812, page 372:

> "To render the manufacturer liable to a third person for injuries the defect must be in a part which would make the vehicle a thing of danger if defective, * * *."

Thus, no recovery is possible where the alleged negligent defect, though constituting an imperfection, does not make the vehicle in question a thing of danger.

The case of *Cohen v. Brockway Motor Truck Corporation*, 268 N. Y. S. 545, is especially pertinent inasmuch as the New York court before whom it arose, while conceding the established authority of the *MacPherson* decision in that jurisdiction, carefully distinguished the same and held that an automobile might well be defective without becoming an imminently dangerous instrumentality. The court's opinion was brief and so clearly apropos on our facts that we will quote it in full:

> "Defendant, Brockway Motor Truck Corporation, is a manufacturer of trucks. It sold one of its trucks to Jacob Cohen, the employer of plaintiff Shirley Cohen. While Shirley Cohen was on the truck, one of the door handles 'gave way and broke causing one of the doors * * * to suddenly open.' As a result 'plaintiff Shirley Cohen was thrown through the said door opening and fell under said truck.'
>
> "Defendant attacks the sufficiency of the complaint. Plaintiffs, in the main, contend that this case is governed by the principle laid down by the Court of Appeals in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053, Ann. Cas.

1916C, 440 L. R. A. 1916F, 696. In that case a rear wheel, which was not of sufficient strength to properly run and sustain the machine, collapsed, causing injury. In *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N. Y. S. 131, a manufacturer was held liable for simple negligence in selling a car, which was not equipped with proper brakes, with the result that it could not be controlled and ran over an embankment. In each of those cases the defective part in the automobile rendered it, while in motion, a 'thing of danger,' and an accident which was almost inevitable, resulted.

"Certain defective parts make an automobile either inherently or imminently dangerous; others do not. In *MacPherson v. Buick Motor Co.*, supra, Judge Cardozo stated: 'There must be knowledge of a danger not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury."

"(1, 2) The doctrine outlined in *MacPherson v. Buick Motor Co.*, should not be extended. It was not intended to make a manufacturer of automobiles liable in negligence for every conceivable defect. We are inclined to the view that it must be in a part which would make an automobile 'a thing of danger.' It cannot be said that this defendant, the manufacturer, could have been charged with 'knowledge of a danger' because of a defective 'door handle.' Such defect may make danger possible, but not probable."

In the case just quoted there can be no question but that the alleged negligent act of the manufacturer theoretically increased the amount of risk assumed by

the plaintiff in the case. However, as was clearly pointed out in the decision, the automobile was not thereby converted into an imminently dangerous instrumentality. Similarly, the possibility that a mechanical part may cease functioning so as to merely necessitate the stopping of a vehicle upon the highway, cannot be said to make such vehicle an imminently dangerous instrumentality. It is a matter of common knowledge that any mechanical device is quite likely to cease functioning at an inopportune or inconvenient time and place; however, such a universally recognized possibility does not in itself call for the application of the imminently dangerous instrumentality doctrine.

This is a mehcanical age and the *MacPherson* doctrine is an outgrowth of the same. It is altogether reasonable and fair to hold a manufacturer of a mechanical device responsible when that thing may react in some abnormal manner creating a situation of imminent danger. The very purpose of the rule is to protect society from the very real risk to which it is exposed when chattels which are dangerous because of defective construction are made available to the public without a warning as to their dangerous condition. The rule was never intended to make manufacturers of mechanical articles insurers against the possibility of a definitely normal or usual breakdown. The law as announced in the cases hereinbefore discussed creates a duty in tort requiring the manufacturer to assume liability arising out of the normal use of a chattel which has become imminently dangerous because of the manufacturer's negligence,

but at least to date no case has seen fit to impose upon a manufacturer (having no contractual privity with a plaintiff) liability where a defective part merely results in a cessation of movement until the part is replaced.

Certainly, if the amended complaint in the instant action states a cause of action against the manufacturer, then every manufacturer of any part in an automobile which, when negligently made, might disable the vehicle so as to require the driver to stop the car even momentarily, would be thrown open to law suits by any person who merely alleged the facts of such "stopping on the highway," plus the additional fact that the plaintiff came into collision with such vehicle after it had come to rest. Both under the common law and by express statute in the State of Washington, it is recognized that automobiles and other vehicles may become disabled while proceeding upon the highway and in such case it is declared lawful for the driver of such vehicle to stop the same upon the highway. §6362-47 of *Remington's Revised Statutes*, reads as follows:

> "§6362-47. PARKING AND STOPPING REGULATIONS. No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway when it is practicable to park or leave such vehicle standing off of the road or improved or main traveled portion of such highway. * * * *The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of the public highway in such manner and to such extent that it is impossible to avoid stopping and*

> *temporarily leaving such vehicle in such position.*" (Italics ours).

It is thus apparent that the stopping upon the highway on our facts did not constitute any breach of local law.

Few Washington cases seem to have dealt with the instant question. In *Baxter v. Ford Motor Co.*, 168 Wash. 456 (page 14 of appellants' brief), the Washington court held a manufacturer of a vehicle represented as containing shatterproof glass liable to a passenger who, on the occasion of a collision, was injured by shattered glass. The court said:

> "The rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, *the article is not safe* for the purposes for which the consumer would ordinarily use it." (Italics ours).

The only Washington case which seems at all in point on the question of a manufacturer's liability for injuries resulting from defective parts is that of *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 P. 945. In that case the plaintiff sought to hold the defendant company liable for injuries sustained when a Ford tractor ended up and tipped over backwards, upon him. The court denied the relief sought on the grounds that the Ford Company could not possibly have anticipated the injury which occurred. While the situation is not closely analogous,

in some respects the court's language is applicable to our own facts. Among other things, it was said:

> "While it may be assumed that tractors generally are sufficiently simple, so that one, even though devoid of natural mechanical skill, may learn to operate them in a very short time, it cannot be said as a matter of law that the manufacturer could anticipate that one would attempt to operate its product without previous knowledge, either from experience or from the instructions provided in the manual.
>
> "This case bears no similarity to those which involve explosive or poisonous substances bearing either misleading directions or no directions whatsoever indicating the character of the article. The very appearance of a complicated piece of machinery, such as this, is in itself a sufficient warning to one who desires to use it, that he should acquaint himself with its powers and possibilities.
>
> "That the manufacturer, who puts out an article with notice to the purchaser of its limitations, restrictions, or defects, is not liable to third persons injured thereby is so thoroughly established as to be undisputed. *Logan v. Cincinnati, N. O. & T. P. R. Co.*, 139 Ky. 202, 129 S. W. 575; *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560; *Pullman Co. v. Ward*, 143 Ky. 727, 137 S. W. 233; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220; *Griffin v. Jackson Light & Power Co.*, 128 Mich. 653, 87 N. W. 888; *Ward v. Pullman Co.*, 138 Ky. 554, 128 S. W. 606.
>
> "The rule is nowhere better stated than in *Olds Motor Works v. Shaffer*, supra, which was an action against a manufacturer for damages sustained by a third person, who was injured by reason of a defective rumble seat in an auto put out by it. It was claimed that the purchaser had knowledge of

its defective condition and that fact would relieve the manufacturer. The court said:

" 'In cases like this, the liability of the manufacturer to third parties, where any liability exists, is put upon the ground that the manufacturer of certain articles intended for general use owes what may be called a public duty *to every person using the articles to so construct them as that they will not be unsafe and dangerous, and for a breach of this duty the manufacturer, within the limitations we will point out, is liable in an action for tort—not contract—to third persons who are injured by his breach of duty.* The class of cases, however, in which the maker is liable to third parties is quite limited; the general rule being that no liability attaches for injury to persons who cannot be brought within the scope of the contract. There are, however, well-defined exceptions to the rule of nonliability, and the courts are singularly agreed as to the law applicable to cases of this character. The rules found in text books and cases, defining the liability of the maker of the article to third persons who are injured by its use, are stated substantially as follows by all the authorities: (1) When he is negligent in the manufacture and sale of an article intrinsically or inherently dangerous to health, limb or life; (2) When the maker sells an article for general use, which he knows to be imminently dangerous and unsafe, and conceals from the purchaser defects in its construction, from which injury might reasonably be expected to happen to those using it. Under the first class fall articles, such as poisons or dangerous drugs, that are labeled as containing innocent or harmless ingredients; and in this class of cases it is not essential to a recovery by the injured party against the maker that knowledge of his mistake or negligence should be brought home to him. His liability rests upon the broader ground that persons dealing in articles intrinsically and inherently dan-

> gerous must use a high degree of care in putting them on the market for the protection of the health and lives of those who may naturally and reasonably be expected to use them. And for his negligence or carelessness alone, without any fraud, deceit, or concealment he may be held accountable in damages to any person injured by their use. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. But in the other class of cases, where the article itself is not inherently or instrisically dangerous to health or life, a third party, seeking to hold the maker liable for injuries suffered by him in the use of the article, must show that the maker knew it was unsafe and dangerous, and either concealed the defects, or represented that it was sound and safe. But even when this is shown, *the maker will not be liable, if it is made to appear that the purchaser had knowledge of the defects at and before the third party was injured in using it* (citing numerous cases). * * *." (Italics ours).

The analysis of the Washington court in the *Foster* case is equally applicable to our own facts. For without a doubt it is a matter of general knowledge requiring no express notification from the manufacturer, that any motor vehicle may on occasion be compelled to stop on the highway due to either a worn out part or some imperfection in the car. Knowledge of this inadequacy in a mechanical device such as an automobile is most certainly common-place not only to purchasers but to every person who operates the same. No person could reasonably be fooled into thinking that his automobile was so perfectly constructed that the manufacturer impliedly represented to him that it would never be necessary to stop upon any highway because of a mechanical imperfection. It must be apparent, then, following the reason-

ing in the *Foster* case, that the mere stopping of a vehicle on the highway because of a mechanical defect is something which every operator of a vehicle knows may occur at some time in the life of any car, and that the manufacturer whose negligence was the cause of such cessation of movement cannot be held for the consequences of such normal behavior. This analysis may be less familiar than one which refers to remoteness or duty but seems nonetheless satisfactory. It is too well known to need any citation of cases that even among the better courts as well as law text writers, analyses of negligence cases are made from vastly different approaches.

Many authorities would probably find that thedefendant owed no duty to the plaintiffs because of the lack of any reasonable foreseeability of such an accident. Other courts, on the same facts, would probably predicate a finding of nonliability on the grounds of remoteness. Judge Cardozo in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, wrote another leading opinion in the field of torts clarifying the meaning of "duty" in negligence cases. The following quotation from his opinion summarizes the facts there involved, and lucidly applies the law (pp. 99, 100, 101):

> "Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held

the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

"The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' *Pollock*, Torts (11th Ed.), p. 455; * * *. The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. ST. Rep. 274. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality

of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else. '*In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining,* the observance of which would have averted or avoided the injury.' McSherry, C. J., in *West Virginia Central & P. R. Co. v. State*, 96 Md. 652, 666, 54 A. 669, 671 (61 L. R. A. 574); * * *.

"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. * * *." (Italics ours).

From this language by Judge Cardozo we believe it wholly fair to say that that eminent jurist would never have permitted the instant plaintiffs to have recovered on our facts. It could hardly be said that the Republic Gear Company in making an axle defective in such manner that it caused a truck to lose its motive power upon the highway constituted a violation of any duty owed to the instant plaintiffs.

The District Court for the Sourthern District of New York in *Schfranek v. B. Moore & Co.*, 54 F. 76, had before it a fact situation which was certainly no more impossible to foresee than the situation alleged in the instant matter. District Judge Woolsey, in that case, said as follows (pp. 77-8):

> "The complaint alleges: That the defendant knew that the packages of Muresco put up and sold by it were intended for ultimate use by painters and decorators, and that the seal which the dealer placed on the package would ordinarily not be broken until the package reached such ultimate users; that the sale of Muresco to retail dealers was for the purpose of resale to such ultimate users; that the plaintiff purchased a package of Muresco; that it was sold to the plaintiff by a retailer of such commodities on the 9th of February, 1930; and that on the same day when the plaintiff was in the act of pouring out some of the powder from the package and had his hand in the package for the purpose of stirring the contents, which he alleges is the ordinary and normal method followed to enable the user of the product properly to manipulate it, his hand was cut by some glass which was intermixed with the Muresco powder.
>
> " * * *.
>
> "*The manufacturer is properly held to a duty to foresee the probable results of such normal use, but he does not have to foresee the possible casual results of a user which departs from the normal.*
>
> "The zone of the possible in casualties is practically limitless.
>
> "Almost anything in the way of an accident is possible. Fully to realize such possibilities usually requires much reflection after the event.

"The zone of the probable, however, is very much narrower, and that is the zone with which tort liability is concerned, and a survey of it involves the exercise of reasonable foresight only.

" * * *.

"Referring with special approval to the principles laid down by Judge Sanborn in *Huset v. J. I. Case Threshing Machine Co.* (C. C. A.) 120 F. 865, 61 L. R. A. 303, Mr. Justice Timlin said, at page 362 of 139 Wis., 121 N. W. 157, 159, 23 L. R. A. (N. S.) 876: 'Negligence in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another. * * * The duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, *to one to whom the duty is due.*' " (Italics ours).

In concluding the argument on this point, we earnestly submit that upon the facts of the second amended complaint, the appellee is not shown to have violated any duty owed to the appellants (1) because no facts are stated which indicate that the allegedly defective axle created an imminently dangerous and reasonably foreseeable situation, and (2) because in any event, since it is a matter of common knowledge that automobiles do fail mechanically in countless ways so as to cause them to merely roll to a stop upon the highway, that this appellant must likewise have known of the existence of such condition and therefore cannot avail himself of any claim of unknown and/or hidden danger.

B. APPELLANTS ARE GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

Upon the allegations of the second amended complaint, the plaintiff should be found guilty of contributory negligence as a matter of law. The general rule to be derived from an examination of the cases is found stated in *Volume 87 A. L. R.* 900 at 901 as follows:

> "As shown by the cases cited in the earlier annotation and the following later cases, some of which involved specific statutes to that effect, it is a well established general rule that it is negligence as a matter of law for one to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the range of his vision ahead."

The general rule thus stated is supported by the following cases, among others:

Dennis v. Stuckey, 37 Ariz. 299, 294 Pac. 276;

Jones v. Hedges, 123 Cal. App. 742, 12 Pac. (2d) 111;

Pennsylvania R. Co. v. Huss, 96 Ind. App. 71, 180 N. E. 919;

Wosoba v. Kenyon, 215 Iowa, 226, 243 N. W. 569;

Testard v. New Orleans, 8 La. App. 238;

Lett v. Summerfield & Hecht, 239 Mich. 699, 214 N. W. 939;

Frazier v. Hull, 157 Miss. 303, 127 S. 775;

Curtis v. Hubbel, 42 Ohio App. 520, 182 N. E. 589;

Cushing Ref. & Gasoline Co. v. Deshan, 149 Okla. 225, 300 Pac. 312;
Filer v. Filer, 301 Pa. 461, 152 Atl. 567;
Fulker v. Pickus, 59 S. D. 507, 241 N. W. 321;
Nikoleropoulos v. Ramsey, 61 Utah 465;
Steele v. Fuller, 104 Vt. 303, 158 Atl. 666.

In *Morehouse v. Everett*, 141 Wash. 399, 252 P. 157, cited by appellants at page 16 of their brief, the Washington court after having carefully considered both its own earlier decisions and outside authorities, referred to probably the leading case of *Lauson v. Fond du Lac*, 147 Wis. 57, 123 N. W. 629, and said:

> "We seriously doubt whether this case, which is the leading one, supports the rule contended for. If this opinion means that one driving an automobile at night must, under all circumstances, see any object in the road in front of him which comes within the radius of his lights, and be able, under all circumstances, to stop his car before striking the object, then we are unable to agree with it. On the contrary, *if it holds that he must see any object which an ordinarily prudent driver under like circumstances would have seen, then we think it states the law correctly*." (Italics ours).

In a later Washington case, that of *Sebern v. Northwest Cities Gas Company*, 167 Wash. 600 at 604, 10 P. (2d) 210, the same court said:

> "It is the duty of the driver of an automobile to drive in such a manner that the vehicle can be stopped within a reasonable distance before striking objects in front of it. *Jacklin v. North Coast Transportation Co.*, 165 Wash. 236; 5 Pac. (2d) 325."

Thus the Washington court has recognized and approved the general rule. There are, of course, exceptions to the rule, and a careful examination of the Washington cases cited in appellants' brief at pages 16 and 17 will show that each case is no more than an illustration of a situation presenting an exception to the rule, because of the additional facts present. In such cases the issue of contributory negligence becomes a jury matter.

In twelve out of the sixteen cases cited by appellant at pages 16 and 17 of their brief to show that a following car may not be guilty of contributory negligence in colliding with the rear of the car ahead, the facts clearly reveal that the car or other object which was run into upon the highway was either wholly without lights or insufficiently lighted. See:

Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157;

Tierney v. Riggs, 141 Wash. 437, 252 Pac. 163;

Griffith v. Thompson, 148 Wash. 243, 268 Pac. 607;

Longmire v. King County, 149 Wash. 527, 271 Pac. 582;

Frowd v. Marchbank, 154 Wash. 634, 283 Pac. 467;

Gilbert v. Solberg, 157 Wash. 490, 289 Pac. 1003;

Crooks v. Rust, 119 Wash. 154, 205 Pac. 419;

Martin v. Puget Sound Electric Railway Co., 136 Wash. 663, 241 Pac. 360;

Wheeler v. Portland-Tacoma Auto Freight Co., 167 Wash. 218, 9 P. (2d) 101;

Layton v. Yakima, 170 Wash. 332, 16 P. (2d) 449;

McMoran v. Associated Oil Co., 144 Wash. 276, 257 Pac. 846;

Henning v. Manlowe, 182 Wash. 355, 46 P. (2d) 1057.

In *Brauns v. Housden*, 186 W. 149, 56 P. 1313, it appeared that the blinding headlights of vehicles approaching from the other direction obscured the vision of the driver of the colliding vehicle.

In the case of *Lindsey v. Elkins*, 154 W. 588, 283 P. 447, it appeared that the entire roadway was blocked by one car which had no lights at all and a second car which had come up alongside and parked there, so as to totally obstruct the right of way.

In the two remaining cases cited by appellants on the instant point, *Devoto v. United Auto Transp. Co.*, 128 W. 604, 223 P. 1050, and *Crowe v. O'Rourke*, 146 W. 74, 262 P. 136, a sudden and impenetrable fog and an equally impenetrable cloud of dust blinded the vision of the drivers of the respective colliding vehicles.

In our instant case no such mitigating circumstances are alleged in the complaint. It is simply alleged that the truck came to rest upon the highway and the appellants' car thereafter came into violent collision with the truck. Upon such facts, which are the only facts admitted by the demurrer, we are presented with a perfect case for the application of the general rule holding appellant guilty of contributory negligence as a matter of law.

C. APPELLEE'S ACTS WERE NOT THE LEGAL OR PROXIMATE CAUSE OF THE APPELLANT'S INJURIES

The complaint, on demurrer, must show by its factual allegations, not only that the defendant's acts violated a legally recognized duty owed to the instant plaintiff, but also that such violation was the legal or proximate cause of the injury. The rule is set forth in *45 C. J.* at page 1093 in these words:

> "In accordance with the rule that a person who has been guilty of negligence is liable only for injuries which are proximately caused by such negligence, a mere allegation of negligence on the part of defendant and of the loss or injury sustained by plaintiff does not charge defendant with responsibility for the damage; but the declaration or complaint must show a casual connection between the negligence charged and the injury sustained, that is, it must, either by a direct averment or by statement of facts, show that the negligence charged was the efficient and proximate cause of the injury sustained."

The instant complaint contains no allegations which show that the defective axle, itself, caused the appellant to run into the truck. It is true that the defective axle caused the truck to lose its power of forward propulsion, but such causative chain ceased when the truck came to rest upon the highway in a strictly lawful manner. There is no showing that the broken axle set into operation other unlawful acts which may themselves have been a legal cause of the injury. As a matter of fact, the com-

plaint merely shows, insofar as the cause of the collision is concerned, that the appellants came into violent collision with a lawfully stopped vehicle. Upon such facts, we submit this court can only presume that the collision was due to the appellants' failure to observe the truck's presence upon the highway. No mitigating circumstances are alleged which might excuse the act of the appellants in colliding with the truck and even if such circumstances were alleged it would also be necessary for the appellant to establish a casual connection between such circumstances and the alleged acts of negligence.

In *Ervin v. Northern Pacific Railway Company*, 69 Wash. 240, 124 P. 690, the Washington Supreme Court had to pass upon the sufficiency of a complaint, and in sustaining the lower court's finding that such complaint was insufficient in law, the appellate court based its conclusion upon the lack of a showing of any causal connection between defendant's acts and the plaintiff's injury. In summarizing the complaint the court said:

> "The question presented in the sufficiency of the amended complaint. Appellant in substance alleged that he was employed as a track worker for respondent; that over him was a foreman, also employed by respondent; that on October 7th, 1908, the foreman carelessly and negligently permitted a hand
>
> car to remain on respondent's railway track in such a position that it was liable to become an obstruction to approaching trains; that an engine approached from a side track and the foreman directed appellant and other track workers to remove the handcar;

> * * * that the engine was near at hand; * * * that, to get the handcar from the track before being struck by the engine, it was necessary for appellant to use extraordinary physical effort, which he did, and that he thereby sustained a hernia, the injury of which he complains."

In applying the law, the court said:

> " * * * The only cause of appellant's injury was his overexertion. The foreman did not order him to use extraordinary effort. There is no allegation that an insufficient number of trackmen were employed, that the engine was out of repair, that the track was not in proper condition, that the handcar should not have been on the track in the first instance, nor that the approaching engine was not under sufficient control to avoid a collision. The circumstances pleaded show an unfortunate action to appellant, but fail to show any negligence on the part of respondent for which it can be held liable."

Likewise in the instant case, though appellees' acts may be said to have caused the truck to stop whereby it became possible for the plaintiff to become injured in the way alleged, so far as is apparent from the instant complaint the only proximate cause of the collision was the act of the driver of appellants' car in unaccountably running into a lawfully stopped vehicle.

We submit, that the instant complaint fails to show wherein any wrongful acts of the appellee were the legal or proximate cause of the appellants' car running into a lawfully stopped vehicle.

ASSIGNMENT OF ERROR No. 2

The grounds for defendants' motion to strike the second amended complaint are set forth in the defendants' motion to strike (R. 50) and the affidavit (R. 51) which was attached to said motion.

It is to be noted, particularly, that the second amended complaint follows the amended complaint practically verbatim save for the omission of the general allegations of negligence of the Morrison Mill Company and the insertion of an allegation to the effect that the collision occurred "before (the truck) it could be removed from the highway." In the original complaint it had been alleged that the "truck could have been coasted off the paved portion of said highway," a statement which contradicts the allegation inserted in the second amended complaint. The original complaint had also contained a number of allegations as to specific acts of negligence by the truck driver, but all of such allegations have been omitted from the second amended complaint.

Upon such a showing it is submitted that the lower court acted wholly within its discretionary power in granting the defendant, Republic Gear Company's motion to strike. The law relative to the motion in question is stated in *Bancroft on Code Pleadings* at page 896 of Vol. I, as follows:

> "It is the general rule that matters inserted in a pleading may be stricken out when they are irrelevant or redundant, or when they are immaterial, unnecessary, superfluous, scandalous, sham, or frivolous."

At page 902 of the same work, we find:

> "An entire pleading may be stricken out in a proper case, as where it is sham or frivolous, * * *."

And at page 908:

> "A 'sham' answer is one good in form but false in fact, or, according to many cases, one good in form but false in fact, and not pleaded in good faith."

We conclude, that it was within the province of the District Court to grant the motion to strike in view of the record and the affidavit of defendant, both of which tended to show that the second amended complaint was sham, immaterial and not pleaded in good faith. However, in any event, the District Court also ruled on the merits of the second amended complaint finding it insufficient in law, which ruling has been covered fully by our argument on assignment of error 1, supra.

ASSIGNMENT OF ERROR No. 3

The District Court ruled correctly in dismissing the instant action. This ruling was based upon the specific rulings of the court discussed hereinabove under Assignments 1 and 2.

We respectfully pray that each and every order of the District Court appealed from in the instant proceedings be affirmed.

Respectfully submitted,

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STANLEY B. LONG,
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